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In the

# Supreme Court of the United States

OCTOBER TERM, 1982

JOHN EDWARD WILLIAMS,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a District Judge may constitutionally refuse to receive evidence in support of a defendant's prompt, non-prejudicial, pre-sentence motion to withdraw his plea and stand trial.

2. Whether the constitutional requirement formalized in Rule 11, that the District Court confirm a defendant's understanding of the law in relation to the facts which form the basis of the charges against him, is met where the Court fails personally to interrogate the defendant regarding the allegations of the indictment and applicable law but instead concludes, based upon evidence taken at ex-parte proceedings involving co-defendants, that a factual basis for the plea exists.

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## OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit was rendered June 10, 1982 (see Appendix A), and the appellate court's order refusing the defendant's petition for rehearing in banc was entered August 30, 1982. (See Appendix B)

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The instant petition for writ of certiorari is being filed within 90 days of the filing of the order of the Circuit Court of Appeals denying Defendant's petition for rehearing.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

United States Constitution, Amendment V provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure, Rule 11 provides, in pertinent part, that:

> (c) Advice to Defendant. The Court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge to which the plea is offered; and,
>
> (2) the mandatory minimum penalty provided by law for the offense to which the plea is offered; and,
>
> (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and,
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

Federal Rules of Criminal Procedure, Rule 32 provides, in pertinent part, that:

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

United States Code, §3772 provides, in pertinent part, that:

> The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States Courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

## STATEMENT OF THE CASE

Defendant John Edward Williams was indicted with co-defendants upon two counts charging, respectively, conspiracy to manufacture methamphetamine and attempt to produce methamphetamine. On the morning of the day before trial was to begin, Williams was con-

tacted by his attorney and advised that both co-defendants had reached a negotiated plea with the government and that Williams should consider entering a plea on a like basis. At 2:40 p.m. that day, Williams appeared in Court with counsel and—having just arrived from out of town—sought additional time to consider his position. Upon the Court's reconvening at 3:30 p.m., Williams through counsel advised the Court that he wished to enter a negotiated guilty plea. In reviewing the proferred plea, the Court neither inquired whether Williams' counsel had stated an opinion as to the likely sentence, nor obtained an unequivocal statement from Williams himself that the allegations of the indictment were true and that he, in fact, had engaged in the conduct charged. Neither did the Court personally interrogate Williams to establish that he understood the charges against him.

Williams immediately thereafter retained other counsel, who promptly ordered relevant transcripts and who, prior to receiving notice for sentencing, filed a Rule 32(d) motion to withdraw the guilty plea. Five minutes before the scheduled hearing on the motion, the government served a memorandum opposing the motion and the District Court, relying on the government brief, refused to permit the defendant to adduce evidence supporting the motion and stated that since it had taken the plea in the first place and satisfied itself that the plea was voluntarily made, it would not permit withdrawal. The Court took such a position despite the fact that the government had suggested no prejudice to its position whatsoever in the event withdrawal were permitted.

In sustaining the District Court's refusal of Williams' motion, the Court of Appeals ruled that a defendant must first assert a "fair and just reason" for presentence withdrawal of his plea before the District Court is obliged to receive proofs, and also that the District Judge's failure personally to address Williams, as required by Rule 11, was inadvertent and harmless since the judge did ask whether Williams had reviewed the charges with his attorney.

## REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

### A.

### WHERE THE GOVERNMENT WILL NOT BE PREJUDICED BY PRE-SENTENCE WITHDRAWAL OF A GUILTY PLEA, DISTRICT COURTS OUGHT NOT ARBITRARILY TO REFUSE SUCH MOTIONS AND AT A MINIMUM SHOULD PERMIT THE DEFENDANT TO ADDUCE SUPPORTING EVIDENCE.

In determining whether in the exercise of its discretion a trial court should permit withdrawal, ABA Minimum Standards, Pleas of Guilty §2.1(b) (Approved 1968), suggests that allowance of the motion to withdraw is proper "for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." The Circuit Courts of Appeal repeatedly have held that where the government would not be prejudiced by withdrawal of the plea, the motion freely should be allowed in the interests of justice.[1] And as pointed out in *Kadwell* v. *United States*, (CA9th 1963), 315 F.2d 667, 670, "[t]he right of an accused to trial by jury has a favored place in our law. Concern for its protection is reflected in the statute by which Congress empowered the Supreme Court to pro-

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[1] *United States* v. *Read*, (CA9th 1976), 534 F.2d 858; *United States* v. *Savage*, (CA4th 1977), 561 F.2d 554; *United States* v. *McGirr*, (CA4th 1970), 434 F.2d 844; *Everett* v. *United States*, (CADC 1964), 336 F.2d 979; *United States* v. *Stayton*, (CA3d 1969), 408 F.2d 658; *United States* v. *Thomas*, (CA9th 1969), 415 F.2d 1216; *Poole* v. *United States*, (CADC 1957), 250 F.2d 396; *Gearhart* v. *United States*, (CADC 1959), 272 F.2d 499.

mulgate procedural rules for the federal courts." Prior to promulgation of the current rules, this Court in *Kercheval* v. *United States*, 274 U.S. 220 (1927), had set out basic grounds upon which withdrawal may rest, establishing the principle that on timely application the trial court should vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear, or inadvertence.

In contrast to the deference to the right of trial by jury recognized by the ABA standards and cited cases, the District Court below refused to afford Williams an evidentiary hearing on his motion to withdraw.[2] The Court so ruled despite the fact that at no time in open court or otherwise had the defendant personally acknowledged guilt.

The District Court record will show that Williams staunchly maintained his right to adduce evidence supporting the motion to withdraw. But the District Court denied the motion on the basis of comments of counsel alone concerning what the evidence would show; and, while the opinion below suggests that Williams claimed an absolute right to withdraw under Rule 32(d), provided only that the government would not be prejudiced by withdrawal (Slip opinion pp. 10-11), in reality his position concerning prejudice to the government had to do not with the ultimate issue of the grounds for withdrawal, but with a procedural question raised by the District Court concerning timing of the motion. In responding to the Court's questioning, counsel pointed out that although Williams had contacted new counsel the

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[2] In colloquy with counsel the Court stated that its questioning of counsel as to the facts supporting the request to withdraw was a hearing on the motion; and, the Court said ". . . I'm not interested in taking evidence on matters that I don't think are material to the issues."

very next day after entering his plea, all of the facts necessary to properly advise him had not been in new counsel's hands until just prior to filing the motion, a time span of some five weeks after the plea initially was entered. That length of time, however, was required for the court reporter to provide even a partial transcript of the plea hearing, whereupon the motion to withdraw promptly was filed. In that context, counsel pointed out that even if there was a delay, the delay was material only if it prejudiced the government. The government argued only delayed administration of justice, not prejudice to its case. And this was not a complicated case requiring the attendance of numerous witnesses or the receipt of detailed evidence. There was no completed act involved in the allegations of the indictment.

In *U.S.* v. *Barker*, 514 F.2d 208 (1975) cert. denied, 42 U.S. 1013, the Watergate "foot-soldiers" case, Judge Wright delivered the in banc opinion analyzing the "fair and just" standard for pre-sentence withdrawal. Judge Wright points out that "the terms 'fair and just' lack any pretense of scientific exactness." 514 F.2d at 220. The opinion notes that even when a plea has been properly entered, a swift motion for withdrawal should be adjudged leniently, as it indicated "that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the government's legitimate interests."

In sustaining the District Court's refusal to receive evidence supporting Williams' motion, the Appellate Court, citing no authority, holds "that a 'fair and just reason' for withdrawal of a guilty plea must be presented to the trial court before an evidentiary hearing on the motion to withdraw need be considered." Slip opinion p. 13. The hearing panel seeks to buttress its holding by pointing

to perceived potential abuse of the sentencing process by defendants who might "test the water" by taking improper advantage of proposed amended Rule 32(c)(3)(A). No supporting data is proferred, however, and the validity of that observation is questionable, since under Rule 11(e)(5) the District Court has the authority to require that a plea agreement be disclosed sufficiently in advance of trial so as not to interfere with the efficient handling of criminal cases. And under present law, a district judge may direct the preparation of the pre-sentence report prior to accepting the guilty plea. *Gregg* v. *United States*, 394 U.S. 489 (1969).

Finally, and as pointed out in *Poole* v. *United States*, (CADC 1957), 250 F.2d 396, 401, ". . . even if a written motion were thought advisable—to inform the Government and the Court more particularly of the grounds for [the] motion—sentencing should have been postponed." In this case, however, the District Court summarily denied the motion and moved immediately to sentencing.

**B.**

**THE STANDARD ADOPTED BELOW, WHICH WOULD PERMIT THE WAIVER OF A DEFENDANT'S RIGHTS TO TRIAL BY JURY, TO CONFRONT HIS ACCUSERS, AND AGAINST SELF-INCRIMINATION WITHOUT REQUIRING THAT THE TRIAL JUDGE ESTABLISH THE PROPRIETY OF THOSE WAIVERS THROUGH DIRECT INTERROGATION OF THE DEFENDANT, IS OFFENSIVE TO THE DUE PROCESS CLAUSE AND DIRECTLY CONFLICTS WITH HOLDINGS IN THE THIRD, FIFTH, AND NINTH CIRCUITS, AS WELL AS WITH CONTROLLING LAW OF THIS COURT.**

The District Court's action and the Appellate Court's opinion below both squarely contravene this Court's holding in *McCarthy* v. *United States*, 394 U.S. 459 (1969),

that a defendant "is entitled to plead anew if a United States District Court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." 394 U.S. at 463-4. Expressing this Court's unanimous view, Chief Justice Warren analyzed Rule 11 as being designed to insure by compliance with its terms that a waiver of a defendant's constitutional rights will be so voluntary and knowledgeable as to be valid under the due process clause. 394 U.S. 465-6. The Court adopted the rule set out by the Ninth Circuit in *Heiden* v. *United States,* (CA9th 1965), 353 F.2d 53, mandating that a conviction be set aside and the defendant allowed to plea anew where the record of the plea hearing itself shows non-compliance with Rule 11. In so holding, Chief Justice Warren wrote that ". . . [t]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* [emphasis in the original] the defendant's understanding of the nature of the charge against him." 394 U.S. 470.[3]

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[3] "We . . . conclude that prejudice inheres in a failure to comply with Rule 11, for non-compliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking." 394 U.S. 471-2.

The appendix in *McCarthy* shows that the trial court's questioning of the defendant was strikingly similar to that engaged in below, both as to the matters about which the defendant was interrogated and as to those on which interrogation was omitted. Neither in *McCarthy* nor here did the District Court inquire of the defendant concerning his personal understanding of the nature of the charges against him. Indeed in this case the only discussion of a factual basis for the plea was the Court's question to the assistant prosecutor whether the government's evidence would have been the same as that stated at a prior hearing (involving co-defendants) at which Williams was not present, which evidence, the District Court commented, was "to the Court" a satisfactory factual basis for the plea.

When subsequently confronted with a motion to withdraw the plea, the Court stated on the record that it "certainly examined [the defendant] under Rule 11 at the time of taking the plea with respect to facts and determine [sic] the factual basis of the plea, freely and voluntarily stated. The Court has since, of course, seen the pre-sentence report which presumably presents a lot of facts, some of which may be disputed. I recognize that." In fact, the Court had not interrogated the defendant concerning his undertanding of the plea, although Williams' attorney, whose performance would have been at issue had the Court received evidence on the motion to withdraw, did advise the Court that he thought the plea was proper.

In addressing this issue the Appellate Court suggests that the trial judge's failure to address the defendant personally was inadvertent and harmless. In support of its opinion, the Appellate Court points out that the Dis-

trict Court reviewed the basic charges and inquired whether Williams had discussed the conspiracy count with his attorney. The panel opinion suggests that such discussion of the charges with his attorney "is sufficient compliance with Rule 11 . . ." Slip opinion p. 17. Such an analysis both overlooks the full scope and purpose of a Rule 11 inquiry, and is inconsistent with the standards implementing *McCarthy* in other circuits. See, for example, *Horsley* v. *United States*, (CA3d 1978), 583 F.2d 670, and *United States* v. *Dayton*, (CA5th 1979), 604 F.2d 931.

## CONCLUSION

In view of the important fundamental rights with which the decision below is in conflict, and to resolve the split between the circuits in applying *McCarthy*, Petitioner respectfully urges the Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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